IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
LETTERS PATENT APPEAL NO.129 OF 1994
(AGAINST FIRST APPEAL NO.92/1979)

Ishtiyaq Ali Farad Ali
Since deceased by his heirs
and legal representatives:
1A) Khatunbi Ishitiaq Farad Ali
Since deceased by her heirs
and legal representatives:
1B) Raees Ahmed Ali
Age 37 years
1C) Nissar Ahmed Ali
Age 35 years, Both R/o.Gunny
Attar Chawl, Room No.46,
1st Ghelabai Street, Madanpura,
Mumbai 400 008 (For self & also heirs
of Deceased 1A) ...Appellants.
(Heirs of Org.Defendant)

Versus

Abdul Shakoor Mohammed Hassan
Since deceased through legal heirs
& representatives:

1A. Ansari Seher Bano Wd/o
Abdul Shakoor R/o R.No.47,
Gani Attar Chawl, 1st Ghelabhai
St., M.Azad Road, Mumbai-8.

1B. Ansari Mohd. Imran S/o
Abdul Shakoor, R/o friends
Colony, Chawl No.3, R.No.10,
Near Mahfil-e-Mahboobi,
Mumbra, Thane 400 612

1C. Ansari Mohd. Rizwan S/o.
Abdul Shakoor, R/o. R.no.48,
Gani Attar Chawl, 1st Ghelabhai St.,
M. Azad Road, Mumbai 400 008.

1D. Ansari Mohd. Rehan S/o.
Abdul Shakoor, R/o. R.No.34,
Gani Attar Chawl, 1st Ghelabhai St.,
M.Azad Road,
Mumbai 400 008.

1E. Ansari Mohd. Furqan S/o.

Abdul Shakoor, R/o R.No.47,
Gani Attar Chawl, 1st Ghelabhai
St., M.Azad Road, Mumbai 400 008.

1F. Shaheda Bano Wd/o Md. Umar
Mehta Ki Chawl, R.No.5,
First floor, Soufer Street,
Behind Haida-e-Ahbab,
Mumbai-8.

1G. Ansari Nazima W/o. Meon Ahmed
R/o R.No.58 Gani Attar Chawl,
1st Ghelabhai St. M.Azad Road,
Mumbai 400 008. ...Respondents.
(Heirs of Original Plaintiff)

Mr.Atul Damle with Mr.P.S.Dani, Advocates for the Appellants.
Mr. Suresh Chandrashekhar i/b Mrs.G.M.Siddiqui Advocate for the Respondent Nos.1a to 1g.

CORAM: H.L.GOKHALE &
SMT.R.S.DALVI, JJ.
DATE : 20th October, 2005.

ORAL JUDGMENT: (Per H.L.Gokhale, J.)

1. By the present Appeal, the Appellants seek to challenge the judgment and order of a Single Judge dated 11th July, 1994 in First Appeal No.92 of 1979 which was filed by the original Respondent (since deceased) and which Appeal came to be allowed by the said judgment. That Appeal arose out of the judgment and order rendered by a Judge of City Civil Court, Mumbai on 6th November, 1978, in Short Cause Suit No.426 of 1962, which was filed by the original Respondent (since deceased). It was filed for seeking possession of the suit premises and came to be dismissed by the learned City Civil Judge.

2. The short facts leading to this litigation are as follows:

The Premises concerned are Room No.46 on the first floor of the Chawl known as Gani Attarwala Chawl situated in Ghelabhai Street, Mumbai-8.It was the case of the original Respondent/Plaintiff (hereinafter referred to as respondent) that he inducted the original Appellant (hereinafter referred to as appellant) in the premises as his licensee by virtue of an agreement entered into between two of them on 20th April, 1959. After the expiry of that agreement, he called upon the Appellant herein to vacate the premises by letter dated 11th January, 1962. The Appellant did not oblige, therefore, the Respondent herein filed aforesaid suit praying for a direction that the Appellant be directed to deliver vacant possession of the suit premises. He also sought arrears of compensation charges and the mesne profits.

3. The Suit was defended by the Appellant by filing a Written Statement. Appellant denied the execution of the agreement. He also denied that he was put in possession

by the Respondent herein but contended that he was put in possession by the brother of the Respondent's uncle. The tenancy of the suit premises was in the name of this uncle Jumman Shahadat and it was his case that his brother one Hasan Shahadat had put him in possession of premises.

4. The learned judge of the Trial Court raised the necessary issues. The issue no.3 amongst them was as to whether City Civil Court did not have any jurisdiction to entertain the suit ? The Plaintiff/ Respondent led his own evidence, thereafter that of his uncle, i.e., Principal Tenant, Jumman Shahadat, his brother Hasan Shahadat and advocate one Mr.Abdul Khalil Ansari who had prepared the agreement in the year 1959. As far as the Appellant/Defendant is concerned, he examined only himself.

5. The learned Judge of the Trial Court considered the evidence on record. He also referred to a proceeding which the landlord of that building had initiated against the principal tenant in the court of Small Causes bearing R.A.E. Suit No.2853 of 64. That suit was filed subsequent to the present suit. As far as the present suit is concerned, the Appellant herein was allowed to remain in the suit premises as the agent of the receiver during the pendency and disposal of the suit. The Small

Causes Court held that the receiver was not joined in that suit and that the notice terminating the tenancy was not duly served on the tenant and therefore, although the Trial Court decreed the suit on the ground of arrears of rent, the said judgment was reversed on 13/12/1972 in Appeal No.631 of 1970. That appeal was filed by the aforesaid Jummat Shahadat. The learned Judge of the City Civil Court referred to that decision and then held that the Defendant had been declared to be subtenant by the Small Causes Court when infact there was no such declaration in that decree. He referred to Section 28 of the Bombay Rent Act. He held that the execution of the agreement was established. He also held that City Civil Court had jurisdiction, yet, it appears from his judgment that so called declaration of the Plaintiff as subtenant impressed him. The learned Judge therefore, dismissed the suit.

6. This judgment was carried in Appeal. A Single Judge of this Court has reversed it. The learned Single Judge has noted the fact that the Appellant/Defendant herein had denied the title of the Respondent in respect of the suit premises. That being so, he will be hit by Section 116 of the Evidence Act, 1872. The learned Judge thereafter noted that having raised dispute regarding the title of the Plaintiff, it was expected from the Defendant

to make out his own case. What is seen from evidence is that as far as the Principal Tenant and his brother are concerned, they are both examined in the Trial Court and their cross-examination was declined by the Defendant. The learned Single Judge referred to the case of **A.E.C.Carapiet Vs. A.Y.Derderian (AIR 1961 Calcutta 359)** which held that wherever the Opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that testimony and the same could not be disputed at all. The learned Judge specifically noted that it was not put to Hassan Shahadat that he had handed over the possession of the premises to the Plaintiff. Jumman Shahadat, the Principal Tenant and his brother Hasan both supported the Plaintiff. That apart, the learned Judge also referred to the evidence of the learned advocate who had prepared the agreement and proved its execution.

7. Considering all these facts, learned Judge held that Plaintiff had made out his case. As far as the jurisdiction aspect is concerned, the learned Judge has not dealt with that aspect in detail, for the reason that the Trial Court has also held that it had jurisdiction. The learned Judge therefore, allowed the Appeal and granted decree for possession. He also directed payment of arrears and also passed the order for assessment of

quantum of mesne profits. This Judgment of learned Judge is in Appeal.

8. Mr. Damle, the learned counsel for the Appellant raised the question of jurisdiction of the City Civil Court. He submitted that under section 41 of the presidency Small Causes Act, 1982, the dispute being between licensor and licensee, same ought to have been referred to the Court of Small Causes and he submitted that City Civil Court does not have jurisdiction.

9. As far as this submission is concerned, it is material to note that this section has been amended in 1976 and thereafter it reads as follows:

> "(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of subsection (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefore,

> irrespective of the value of the subject matter of the such suits or proceedings".
>
> (2) Nothing contained in subsection (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act 3(the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply".)

However, at the relevant time i.e. prior to amendment in 1976, it read as follows:

> 41. Summons against person occupying property without leave.- When any person has had possession of any immovable property situate within the local limits of the Small Cause Court’s jurisdiction and of which the annual value at a rack-rent does not exceed (two) thousand rupees, as the tenant, or by permission, or another person, or of some person through whom such other person claims,

and such tenancy or permission has determined or been withdrawn.

and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person.

Such other person (hereinafter called the applicant) may apply to the Small Causes Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property".

10. In the present matter, we are concerned with the rights of the parties as they stood when the agreement was made in the year 1959 and suit was filed in the year 1962 which is much prior to the this amendment of 1976. As far as this section as it stood earlier, is concerned, the same had been interpreted by various Courts. To cite a few judgments in **Govindram Salamatrai and Anr v. Dharampal Amarnath and Anr.,** Division Bench of this Court (Per Chagla, C.J. (AIR (38) 1951 Page 390) clearly took

the view that when a Plaintiff files a suit against a defendant alleging that he is his licensee, it is a suit which cannot be entertained and tried by the Small Causes Court because it is not a suit between a landlord and a tenant, and judging by the plaint no question arises out of the Rent Control Act or any of its provisions which would have to be determined on the plaint as it stands. This view has been reiterated by another Division Bench in **K.M.Motwani v. Albert Sequeira and Anr. reported in AIR 1960 Page 18.** The observations of Chagla, C.J. in Paragraph 4 of this judgment are reproduced for the sake of record.

> "(4) The jurisdiction conferred upon the Small Cause Court under Chapter VII is a very special and limited jurisdiction. It entitles parties to recover possession by a summary procedure. No suit has to be filed; only an application has to be made no decree is passed; only an order for ejectment is passed. But the summary right to obtain possession can only be exercised strictly within the limits laid down by Chapter VII itself. There is nothing to prevent a party from obtaining possession in the ordinary courts of the land if he has a right to possession under the ordinary law. but when a party comes to the Small Causes

Court under Chapter VII and makes an application, he must satisfy the Court that his application is maintainable and that he is entitled to the order as provided by that Chapter".

It is material to note that view taken in Govindram Salamatrai (Supra) case came to be confirmed by the Apex Court in **Raizada Topandas and another v. M/s. Gorakhram Gokalchand reported in AIR 1964 Supreme Court 1348.** The Apex Court clearly held after referring to Section 28 of the Bombay Rent Act that the suit by a licensor against a licensee for reliefs based on termination of licence, will not be within the exclusive jurisdiction of the Small Causes Court merely because defence is raised as to the existence of relationship of landlord and tenant.

11. As far as the amended section is concerned, now there is no difficulty in saying that such a suit will lie in the Court of Small Causes which is because of the wording of the Section as it now stands. That view has been taken by a Division Bench in **Nagin Mansukhlal Dagli v. Haribhai Manibhai Patel reported in AIR 1980 Bombay Page 123** followed by a Single Judge in **Eknath Vithal Ogale v. Mansukhlal Dhanraj Jain reported in 1988(2) Bombay**

C.R. Page 9 and which view has been confirmed by the Apex Court in **Mansukhlal Dhanraj Jain And Others v. Eknath Vithal Ogale reported (1995) 2 Supreme Court Cases Page 665**. As stated above, however, in the present matter we are concerned with the position and the Section as it stood prior to 1976. It has been interpreted by this Court and that interpretation has been upheld by the Apex Court. That being so, there is no difficulty in accepting that City Civil Court had jurisdiction to try and entertain the present suit. Therefore, the submission of the Appellant in that behalf cannot be accepted.

12. As far as the merits of the case are concerned, Plaintiff is supported by his uncle, Principle Tenant and his brother. Principle Tenant and his brother had not been cross-examined by the Defendant. The Advocate who drafted the agreement has entered into witness box and has confirmed having created a document which was signed by both the Parties. Though under the agreement, the defendant was to pay the rent payable for the premises directly to the landlord of the building, an outer limit was specified until which the occupation of the defendant was permitted. This being the position, the Plaintiff/Respondent was fully within his rights to insist upon implementation of that agreement, when the period

under the agreement was over and when he wanted him to return the possession. The learned Judge of the City Civil Court was clearly in the error when he held that the defendant had been declared to be subtenant by the Small Causes Court. Nothing of the sort had happened. All that happened was that the tenant's appeal was allowed for not serving a valid notice of termination and not joining the receiver. However, there was no declaration in his favour and there was no occasion for a declaration of subtenancy of the present defendant/Appellant.

13. In view of what is stated above, on merits also the learned Single Judge was right in reversing the judgment of the Trial Court and directing the Appellant to hand over the possession of suit premises and to direct payment of the arrears and payment of mesne profits.In the circumstances, we do not find any merit in the Appeal. Appeal is, therefore, dismissed with costs. Order of stay pending appeal will stand vacated.Receiver appointed for the premises will stand discharged. The Receiver will pay the amount of compensation collected to the Respondent after deducting his costs charges and fees. Although the Appeal is dismissed, we find that the valuation of the suit at Rs.500/- as the market value is perhaps not very correct. That being the position before the decree is

drawn for execution, registry of the Trial Court will examine as to what should have been the correct valuation of the suit when the suit was filed in the year 1962. In the event it is found to be more, the Plaintiff will have to pay appropriate additional court fees before executing the decree.

14. Mr.Damle, the learned counsel for the Appellant, seeks stay of this judgment. In as much as the Appellant is now required to vacate the premises and hand over the possession, this judgment and order will remain stayed for a period of 12 weeks.

15. The record and proceedings of the Suit be returned to the trial Court.

(H.L.GOKHALE,J.)

(SMT.R.S.DALVI, J.)